85-1986

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THERON W. ANDERSON, PETITIONER

v.

STATE OF ALASKA, RESPONDENT

PETITION FOR A WRIT OF

CERTIORARI TO THE SUPREME COURT

FOR THE STATE OF ALASKA

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

CAN A CRIMINAL DEFENDENT CONVICTED OF A MISDEMEANOR BE SENTENCED TO A TERM OF IMPRISONMENT ABSENT A KNOWING AND INTELLIGENT WAIVER OF COUNSEL ON THE RECORD.

PARTIES

THERON W. ANDERSON, Petitioner,

in his own proper person

v.

STATE OF ALASKA, Respondent,

an artifical person

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DISTRICT OF ALASKA

ss.

THIRD JUDICIAL DISTRICT

I, THERON W. ANDERSON, BEING DULY SWORN HEREBY STATE AND INCORPORATE AS TRUE THE STATEMENTS HEREIN AND THE ATTACHED APPENDIX.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THERON W. ANDERSON, PETITIONER

v.

STATE OF ALASKA, RESPONDENT

PETITION FOR A WRIT OF

CERTIORARI TO THE SUPREME COURT

FOR THE STATE OF ALASKA

Petitioner, THERON W. ANDERSON, respectfully urges that a Writ of Certiorari issue to correct the denial of the Supreme Court of the State of Alaska's refusal to hear claim of rights violation, denial of assistance of Counsel for his defense.

OPINIONS BELOW

The State Supreme Court of Alaska denied on April 3rd, 1986, (App.3-4) to hear a petition filed on February 26, 1986. The petition was based on an appeal from the Court of Appeals, the intermediate appellate court, on the 19th of February, 1986, (App.1-2) that upheld the conviction and judgement of the District Court at Palmer, Alaska on May 1st. 1985.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Sect. 1651 and Art. III of the United States Constitution.

The Supreme Court has jurisdiction to hear an appeal, when the record evinces a violation of a citizen's constitutionally protected rights.

The record of the trial court shows that the petitioner was not afforded counsel. Due process of law and equal protection of the law is binding on the states by the fourteenth amendment to the U.S. Constitution. Gideon v. Wainwright, 372 US 335 (1963) The Supreme Court will review the finding of facts by a state court where a Federal right has been denied..... Fiske v. Kansas, 274 US 380 The Supreme Court has jurisdiction under 28 U.S.C. Section 1651 and Article III of the Constitution to enforce the jurisdictional limitation of the Sixth Amendment on the appellate and trial courts of Alaska.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy ... the assistance of Counsel for his defense."

UNITED STATES CONSTITUTION

Article VI, Clause 2

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

28 U.S.C. SECTION 1651

WRITS (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

CONSTITUTION OF THE STATE OF ALASKA

ARTICLE 1, SECTION 11

"In all criminal prosecutions, the accused shall have the right ... to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Mr. Anderson was convicted of one count of violation A.S. 28.35.030 (a) (driving while intoxicated), on the 1st of May, 1985, in District Court at Palmer, Alaska.

At his arraignment on 27 December, 1984, Anderson ddemanded all of his rights at all times and waived none of them (R. pg. 5, PAC 1137, Log 1920). Also at the arraignment, the Court inquired as to whether Anderson would seek his own counsel and he indicated that he was exploring the possibility (R. pg. 5, PAC 1137, Log 1918) and considering his options.

Anderson appeared at his trial call on 25 January, 1985 with counsel of his choice. Prior to this appearance Anderson had filed a Notice of Assistance of Counsel or Co-counsel, on 10 January, 198 (R. pgs. 15-18). At trial call, Anderson's counsel

had requested that the Court make a determination of this and the Court refused to address it at that time (PAC 1163).

On 12 April, 1985, by order signed by Judge White, Anderson was denied counsel specifically pursuant to his Notice of Assistance of Counsel or Co-counsel (R. pg. 41).

At no time did Anderson waive his right to Assistance of Counsel from arraignment through to the trial of the action.

Anderson timely appealed his conviction to the Alaska Court of Appeals bringing four points on appeal. That court affirmed the trial courts conviction on 19th of February, 1986 (App. 1-2). On 26th of February, 1986, a petition for a hearing to the Supreme Court for the State of Alaska was filed.

A denial of the petition was entered

by the direction of the court on 3rd of April, 1986 (App. 3-4). Anderson's first point on appeal through the proceedings is the denial of counsel of choice and the fact that there was no waiver of his right to counsel.

REASONS FOR GRANTING THE WRIT

Anderson relies upon his right guaranteed to him by the Sixth Amendment to the United States Constitution which provides the an accused shall enjoy the assistance of counsel for his defense. In Gideon v. Wainwright, (supra) the United States Supreme Court held that the fourteenth amendment to the U.S. Constitution mandated application of the assistance of counsel clause of the sixth amendment to state trials. The right to the assistance of counsel was thus recognized as essential for a fair trial. Anderson also relies on Article I, Section 11 of the Alaska

Constitution, to wit:

> "In all criminal prosecutions, the accused shall enjoy....the Assistance of Counsel for his defense."

The record clearly shows that Anderson demanded all of his rights at the first instance at arraignment and appeared at calendar call with the counsel of his own choosing and was denied same by signed order of the court.

It is a historical fact that many of the men who contributed to the writing and ratifying of the Constitution were attorneys such as John Jay, the first Chief Justice of the U.S. Supreme Court, and John Marshall, a later Chief Justice. John Adams, James Wilson, John Blaire, and Oliver Ellsworth were among the many fine attorneys who assisted in approving the language used in our Constitution. Are we to believe that the word "COUNSEL" was selected by these "attorneys" with no

thought whatever to its Common Law meaning of that time?

In discussing a defendant's right of counsel, the U.S. Supreme Court held:

> "An accused must be allowed to employ counsel of his own choice and he must be given a reasonable opportunity to do so."

And,

> ".....his right to be heard through his own counsel is UNQUALIFIED."

Chandler v. Fretag, 348 US 3

In consulting Noah Webster's 1828 dictionary, the word "unqualified" is defined as follows:

> "Not modified, limited or restricted by conditions or exceptions;...." (Noah Webster's First Edition of an American Dictionary of the English Language, 1828, replublished in Facsimile edition by the Foundation for American Christian Education, San Francisco, CA., 2nd edt., 1980)

It is undeniable that the explicit use of the word "counsel" in the Sixth

Amendment was intended to mean someone other than an attorney, as well as an attorney. This view is upheld by the U.S. District Court when they recognize an accountant as counsel and reprimanded an IRS employee:

> "Yet while he was informing the prospective defendant of his Right to Counsel, he was simultaneously requesting that the Defendant's Counsel leave the interrogation. In effect, the investigator informed Tarlowski that he might have his attorney present but not his accountant."

Ruling in favor of Tarlowski's motion to suppress, the Court said:

> "For a government official to mouth in a ritualistic way part of the warning about the right to counsel, while excluding the person relied upon as counsel is, in effect, to reverse the meaning of the words used." (District Court for the Eastern District of New York)

U.S. v. Tarlowski, 305 F. Supp. 112 (1969)

To have a "friend" act as Counsel was a Common Law Right and was recognized as such in the Bill of Rights when the word

"counsel" was used instead of "attorney".

No limit or qualification was ever intended to be put upon the Right to "assistance of counsel" in the Sixth Amendment and Anderson submits that the word "counsel" was used in recognition of the Common Law Right to have one's "friend" speak for him, if he so chose. Reference to the Common Law is mandatory in a proper interpretation of the Constitution, but most particularly in the Bill of Rights. There is a preponderance of U.S. Supreme Court cases which uphold the position of Anderson on interpretation of the Constitution.

To narrowly interpret the word "Counsel" to mean only "licensed attorneys" is an infringement of Defendant's Sixth Amendment right to counsel, which even the U.S. Supreme Court has held is "unqualified". (Chandler v. Fretag, supra)

The words of the Amendment are simple, clear, and not ambiguous and were obviously written by our forefathers to be understood by The People, as the following citation undeniably indicates:

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical meaning; where the intention is clear, there is no room for construction, and no excuse for interpolation or addition." Martin v. Hunter's Lessee, 1 Wheat 304.

And Further,

> "It cannot be presumed that any clause in the Constitution is intended to be without effect;..."

Marbury v. Madison, 5 US 137, 174

In Faretta v. California, 422 US 806, the Court's decision guarantees one the absolute right of self-representation in court, and, by implication to a counsel of one's choice, even when such counsel is not a member of a Bar Association or a licensed attorney. The intent of the

Framers in drafting the Constitution and the Bill of Rights is clear from Faretta:

> "In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England.
> The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the "lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution." Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." In the heat of these sentiments the Constitution was forged."

Faretta v. California, 422 US 806, 826, 827

The Court went on to say in Faretta:

> "As we have noted, Section 35 of the Judiciary Act of 1789, signed one day

> before the Sixth Amendment was proposed, guaranteed in the federal courts the right of all parties to "plead and manage their own causes personally or by the assistance of ....counsel." 1 Stat. 92. See USC section 1654. At the time James Madison drafted the Sixth Amendment, some state constitutions guaranteed an accused the right to be heard "by himself" and by counsel; others provided that an accused was to be "allowed" counsel."

Faretta, supra, at 831 (underlined emphasis added)

Now, Section 35 of the Judiciary Act of 1789, fully quoted, reads as follows:

> "....the parties may plead and manage their own causes personally, or by the assistance of such counsel OR attorneys at law." (emphasis added)

Clearly then, it was the intention of the Framers that Anderson or any litigant for that matter, was guaranteed counsel of his own choosing without qualifications by the Sixth Amendment.

> "The intention of the lawmaker constitutes the law."

Stewart v. Kahn, 78 US 493, 504

The High Court addressed this issue in the decision rendered in Johnson v. Avery, 393 US 483, and the concurring opinion of Justice Douglas leaves no doubt as to the right to counsel of choice:

> "Laymen - in and out of prison - should be allowed to act as "next friend" to any person in preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.
> The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "reasonable access to the courts" is to be available to the indigents among us."

Johnson v. Avery, 393 US 483, 498

Rights are not subject to regulation or abrogation at any time and the trial court did not have it within its discretion to deny Anderson counsel of his choice:

> "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Miranda v. Arizona, 384 US 436, 491

At no time did Anderson waive his right to counsel and a conviction obtained where the accused was denied counsel is treated as void for all purposes (Burgett v. Texas, 389 US 109). Further, any waiver of a constitutional right must be a knowing and intelligent act, done with sufficient awareness of the consequences of that act.

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

Argersinger v. Hamlin, 407 US 25, 37

And,

> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."

Argersinger, supra (emphasis added)

The record in the instant case is completely devoid of any waiver of the

right to counsel as mandated in Argersinger, supra, and as discussed by the High Court in the following:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused - whose life and liberty is at stake - is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Johnson v. Zerbst, 304 US 458, 465 (1938) (emphasis added)

This emphatic reasoning is also found in the Alaska cases of:

Ledbetter v. State, 581 P.2d 1129 and

O'Dell v. Municipality of Anchorage, 576 P.2d 104.

CONCLUSION

It is the responsibility of the trial judge to determine as to whether there has been "an intelligent and competent waiver" of counsel by the accused. "And it would be fitting and appropriate for that determination to appear upon the record." There is no waiver of counsel or any other right appearing on the record in this case. It is for the State to show that Anderson's choice of counsel was ineffective or any less competent than a licensed attorney.

The United States Supreme Court should exercise its Constitutional authority over the Supreme Court for the State of Alaska by reversing its order and ordering compliance with the hallmark requirements of the Sixth Amendment.

RESPECTFULLY SUBMITTED this 21st day of June, 1986.

Theron W. Anderson

On this 2nd day of June 1986, before me a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared Theron W. Anderson to me known to be the individual who executed the within and foregoing instrument, and acknowledged the said instrument to be his free and voluntary act and deed, for the uses and purposes herein mentioned.

GIVEN UNDER MY HAND AND SEAL this day of June, 1986.

Notary Public in and for Alaska
My commission expires:
02-10-87

APPENDIX

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COURT OF APPEALS

FOR THE STATE OF ALASKA

THERON W. ANDERSON, Appellant,

v.

STATE OF ALASKA, Appellee.

File No. A-981
[No. 1082- February 19, 1986]

MEMORANDUM OPINION
AND JUDGEMENT

Appeal from the District Court
for the State of Alaska

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

The judgement of the district court is AFFIRMED.

IN THE SUPREME COURT

OF THE STATE OF ALASKA

THERON W. ANDERSON,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

No. S-1436
Court of Appeals No. A-981
District Court No. 3PA 84-2127 Cr.

FILED APR. 7, 1986

O R D E R

Appeal from the Court of Appeals of the State of Alaska

Before: Rabinowitz, Chief Justice, Burke Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing, filed February 26, 1986,

The petition for a hearing is denied.